

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

*Original
Filing*

77-1338

To be argued by
HARVEY M. STONE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1338

UNITED STATES OF AMERICA,

—against—

RAFAEL JESUS ALEJANDRO,

Appellee,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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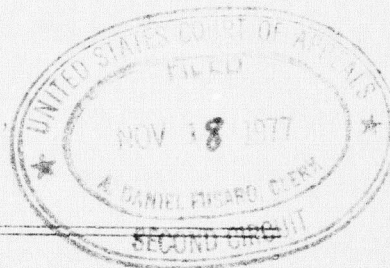


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Appellee,

—against—

RAFAEL JESUS ALEJANDRO,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

The appellant, Rafael Jesus Alejandro, appeals from a judgment entered on May 20, 1977, in the United States District Court for the Eastern District of New York (Bramwell, J.), upon his plea of guilty, convicting him of conspiring to distribute heroin in violation of Title 21, United States Code, Sections 841(a)(1) and 846, and sentencing him to a term of imprisonment of five years with a special parole term of five years.*

Appellant contends that his guilty plea should be vacated under Rule 11(c), Federal Rules of Criminal Procedure, since the district court, while advising him that his offense carried a maximum 15 years' imprisonment plus a minimum three years' special parole, failed to advise him that the maximum possible special parole term could be for "life".

* Appellant is presently serving his sentence.

Statement of Facts

On April 1, 1977 appellant asked to withdraw his plea of not guilty and to plead guilty to one count of an indictment charging him with conspiring to distribute 71 grams of heroin on January 25, 1977.¹ At a "Rule 11" inquiry held that day, appellant, who was represented by retained counsel, was personally addressed by Judge Bramwell. Appellant was advised that he had a right to an attorney and that, if necessary, one would be appointed for him. Judge Bramwell told him that he had the right to persist in his plea of not guilty, the right to a speedy and public trial by jury with the assistance of counsel, the right to confront and cross-examine witnesses, the right to compulsory process, and the right not to be compelled to incriminate himself. (T. 3-4).² Judge Bramwell then asked appellant if he understood that if he pleaded guilty there would be no trial and he would waive the right to trial; appellant replied that he understood. (T. 4-5).

Judge Bramwell said: "Ask Mr. Alexandro if he understands that if he pleads guilty the Court may ask him questions about the offense to which he offers to plea?" Appellant replied, "Yes, Sir. I understand." (T. 4). Judge Bramwell then read Count Three of the indictment, the count to which appellant pleaded guilty, defined the crime of conspiracy, and established a factual basis for the plea. (T. 5-9).

The Court inquired whether any promises had been made to induce appellant to plead guilty, and appellant replied that none had been made. The Assistant United

¹ The seven-count indictment charged appellant and three other individuals. Appellant was charged in only one count, Count Three.

² "T." references are to pages in the transcript of the proceedings of April 1, 1977.

States Attorney then stated that when appellant was sentenced on the charges before the court, a five-count indictment against appellant in the Southern District of New York would be dismissed. (T. 9-12). Appellant stated that he had not been threatened or coerced into pleading guilty. (T. 12).

Then the following colloquy occurred with respect to the maximum sentence that could be imposed (T. 12-14):

THE COURT: Now, ask him if he knows that the maximum sentence which may be imposed is a prison term of 15 years and/or a fine of \$25,000 plus a special parole term of at least three years.

THE DEFENDANT: Yes.

THE COURT: All right, a special parole term, under this section may be revoked if its terms and conditions are violated. In such circumstances, the original term of imprisonment shall be increased by the period of the special parole term, and the resulting new term of imprisonment shall not be diminished by the term which was spent on special parole.

A person whose special parole term has been revoked, may be required to serve all or part of the remainder of the new term of imprisonment.

A special parole term provided for in this section shall be in addition to and not in lieu of any other parole provided for by law.

THE INTERPRETER: He had a question with regard to parole.

THE COURT: A special parole term is a minimum of three years in this case, but it's in addition to any parole. It's a parole term.

THE DEFENDANT: If I'm given an additional parole term, I still have to comply with the three years special?

THE COURT: It's a minimum parole term. It's a minimum of three years in this case.

Now, ask Mr. Alejandro, has your lawyer made any prediction or expressed any opinion as to what sentence will be imposed?

THE DEFENDANT: Yeah. He more or less told me, he has told me the maximum.

THE COURT: What did he tell him as to the maximum?

THE DEFENDANT: 15 and a fine.

The defendant then pleaded guilty to Count Three. The Court found that there was a factual basis and accepted the plea. (T. 14).

ARGUMENT

Appellant's guilty plea should not be vacated inasmuch as the sentence which he actually received was well within the maximum which he was told could be imposed.

1. The plea proceeding administered by the District Court satisfied the stringent due process standard set out by the Supreme Court for insuring that a plea of guilty is made knowingly and voluntarily. Appellant does not contend otherwise. Appellant argues, however, that his plea must be vacated because, prior to entry of the plea, the Court did not properly advise him of the "maximum possible penalty required by law", Rule 11 (c) (1), F. R. Crim. P. Specifically, appellant contends

that the plea must be vacated because the district court, while informing him that it could impose a maximum sentence of 15 years' imprisonment plus at least three years' special parole, did not advise him that the special parole term could be indeterminate.³ In light of the sentence which appellant actually received—five years' imprisonment plus five years' special parole—we submit that his plea and sentence should be left undisturbed.

We recognize that language can be extracted from this Court's opinion in *United States v. Journet*, 544 F.2d 633 (1976), suggesting that any failure by the district court to meet the requirements of Rule 11 mandates that the plea be vacated. See *Journet, supra*, 544 F.2d at 634 ("unless the defendant is specifically informed of each and every element enumerated in Rule 11 the plea must be vacated"). Significantly, however, the facts on which that decision was based showed a much more significant violation of the Rule 11 requirements than is present here. Thus, in *Journet* the district court failed to advise the defendant not only of the maximum possible sentence, but also of a whole series of rights enumerated in Rule 11—i.e., "that if he should go to trial upon his not guilty plea he would have the right to assistance of counsel at the trial, that his guilty plea would waive his right against self-incrimination, that if his guilty plea was accepted no further trial of any kind would be held [footnote omitted], and that if he should decide to plead guilty the court would have the right to ask him questions under oath about the offense, in which event, if he should give untrue answers, his statements under oath could be used against him in a prosecution for

³ The statute does not explicitly provide a maximum special parole term of life, but the courts have construed the statute to authorize such a maximum. *E.g.*, *United States v. Jones*, 540 F.2d 405 (10th Cir. 1976); *United States v. Rich*, 518 F.2d 980 (8th Cir. 1975).

perjury" (544 F.2d at 636-637). This Court specifically held that it was reversing the judgment below "[i]n view of these deficiencies" (*id.* at 637). Here, by contrast, only a single item was omitted from the Rule 11 enumeration, and as we discuss below, that error was technical and inconsequential under the facts of this case.⁴ Thus, *Journet* does not set forth absolutely rigid guidelines which warrant a reversal in a case such as this. Indeed, as this Court subsequently held in *United States v. Saft*, 558 F.2d 1073, 1081 (1977): "*Journet* was thus a case of conceded failure to comply with several items of Rule 11(c) and this Court's insistence on explicit and specific information of 'each and every element enumerated in Rule 11', 544 F.2d at 634, must be read in that light."⁵

Even in *Journet* this Court explicitly recognized the need for some flexibility in administering Rule 11. Thus, with respect to the requirement of Rule 11(c)(5) that a defendant be advised of the Court's right to ask him questions under oath, the Court noted that it was not customary in the circuit to place defendants under oath and stated only that such a warning was "advisable" (544 F.2d at 637, n.6). In *United States v. Michaelson*,

⁴ The district court here also did not advise appellant that his statements could be used against him in a perjury prosecution, but post-*Journet* decisions by this Court make clear that such an omission is inconsequential where, as here, the defendant is not placed under oath during his guilty plea inquiry. *E.g.*, *United States v. Michaelson*, 552 F.2d 472, 477 (1977); *United States v. Saft*, 558 F.2d 1073, 1079 (1977).

⁵ The Court in *Saft* went on to observe (*id.* at 1081 n. 8):

Indeed, the colloquy under consideration in *Journet* did not include explicit advice as to "the nature of the charge" beyond characterizing it as "a felony, which is a major crime" nor any express advice of a "right to plead not guilty or to persist in that plea"—points neither asserted on appeal nor addressed by the *Journet* court but claimed to require reversal under *Journet* in this appeal.

supra, 552 F.2d 472, this Court rejected a defendant's claim that his guilty plea should be vacated where the defendant, contrary to Rule 11(c), had not been advised that his answer, if sworn, could be used against him in a perjury prosecution and where he had not been told that he could not be compelled to incriminate himself. The Court in *Michaelson* observed (552 F.2d at 477):

[W]e believe that vacating appellant's guilty plea would be a needlessly rigid reading of amended Rule 11 and of *Journet*. The panel in that case itself recognized at least a minimum of flexibility in applying Rule 11(c).

The Court also noted that *Journet* "indicated some leeway for assessing the failure to give [the] advice [that sworn answers could be the basis of a perjury prosecution], at least when, as here, the defendant was not put under oath before questioning about his guilty plea" (552 F.2d at 477).

Similarly, the Court in *Michaelson* refused to order the vacating of the plea, in spite of the district court's failure under 11(c)(3) to advise about the right against self-incrimination, where circumstantial evidence suggested that the omission was of no practical consequence (552 F.2d at 477):

The other alleged deficiency in the taking of the guilty plea—the judge's failure specifically to advise Michaelson of his right not to be compelled to incriminate himself—raises more of a problem. The Government points out that at the time of sentencing (after Michaelson had unsuccessfully moved to withdraw his plea), his attorney made clear that Michaelson had intended to testify at trial in order to establish his defense of entrapment. Moreover since Michaelson was represented by a competent attorney, who had gone as far as

to pick a jury and participate in a trial, it seems highly unlikely that the lawyer would not have advised Michaelson of his right not to incriminate himself. It seems clear, then, that Michaelson did not plead guilty because of a belief that the Government could force him to take the stand against his will. We realize that a major purpose of the amendments to Rule 11 and its strict reading in *Journet* is to avoid all such fine inquiries by establishing a detailed prophylactic check test. Yet, we cannot ignore that the plea was taken after the trial commenced and before *Journet* authoritatively construed the amendments to Rule 11, and in a context where Michaelson must have known his rights. Under these circumstances, we believe it would be a needlessly rigid construction of Rule 11 to hold that the guilty plea on this record must be set aside.

See, similarly, *United States v. Saft*, *supra*, 558 F.2d at 1080 ("It would defy reality to suppose that Saft had any doubts [about his right to trial counsel, which the district court failed to enumerate]. *** The Supreme Court has very recently instructed us not 'to ignore the record and reality' "). Cf. *Del Vecchio v. United States*, 556 F.2d 106 (2d Cir. 1977).

We submit that, in view of the sentence actually imposed here, which was well within the maximum which appellant was told he could receive, the district court's failure to tell appellant that the special parole term could be indeterminate was an error which appellant has no legitimate basis to complain of. Appellant's actual sentence clearly did not exceed his own expectations, as defined by what he was told as to the maximum sentence impossible. In this sense, it can be said—and appellant does not contend otherwise—that appellant fully appreciated the consequences of pleading guilty at the time he entered

the plea. (Indeed, appellant does not even claim that he would not have pleaded guilty if he had known the maximum possible special parole term.) Since appellant in fact received a considerably shorter sentence than the district court advised him of, vacating his guilty plea would be a needlessly rigid reading of amended Rule 11 and *Journet*, particularly in light of post-*Journet* decisions interpreting the scope of that holding.

In the present case, appellant was told that he could receive a prison term of fifteen years, a \$25,000 fine, and an additional minimum term of special parole of three years. Thus, with good behavior, his period of supervision would be eighteen years and, with bad behavior, as much as twenty-one years.⁶ Appellant received a substantially shorter sentence, a prison term of five years and five years' special parole, and faced a period of supervision between ten and fifteen years, depending upon his behavior. Thus, the sentence appellant received was fully within the sentence he understood that he could receive. Allowing the plea to stand in this situation is consistent with the purpose of Rule 11 and with this Court's decisions interpreting the Rule's requirements.⁷

⁶ We compute the outside limit of this period on the basis of the consequences that would flow if a convicted and sentenced defendant were to violate his special parole term when it was about to expire, thereby incurring a prison term equal in length to the original special parole term.

⁷ This Court observed in *Del Vecchio v. United States*, *supra*, 556 F.2d at 109:

The commendable policy behind ***the revision of the Rule was to make sure that a defendant acted voluntarily and knowledgeably before taking the grave step of pleading guilty and waiving various Constitutional rights.

See also *United States v. Saft*, *supra*, 558 F.2d at 1081 ("If it were not for *United States v. Journet*, *supra*, we thus would have no doubt that the judge complied with amended Rule 11 (c) (1)").

The defect in the present proceeding is closely analogous to the defects that were found inconsequential in *Michaelson* and *Saft*. Appellant should not be allowed to escape the consequences of his voluntary and intelligent plea where the sentence he received was well within the range he understood he could receive. The fact that the Court did not inform him he might have gotten an even longer sentence should not cause this Court to vacate his plea.

Significantly, in *Journet* the defendant received a sentence which exposed him to a possibly longer period of supervision than he was advised of at the time he entered his plea. There, the defendant was told he could receive a sentence of fifteen years and a mandatory minimum term of three years' special parole, and he was sentenced to eight years and a special parole term of seven years—exposing him to a possible fifteen year prison sentence and seven years' special parole. Similarly, in *Ferguson v. United States*, 513 F.2d 1011 (2d Cir. 1975), this Court set aside a plea where the defendant was sentenced to five years and a five year special parole term after being advised only that he faced a possible five year maximum. Moreover, in *Del Vecchio, supra*, this Court reached the same result the Government urges in the present case on a § 2255 motion. Thus, the Court did not vacate a plea where the total sentence was less than the sentence of which the defendant had been advised.

Allowing guilty pleas to stand where the actual sentence is well within the boundaries defined by the district court is an approach that would fully protect the legitimate interests of defendants in these cases; and such an approach would not present any difficult problems on appellate review. Accordingly, we respectfully submit

that, as a matter of practicality and common sense, this Court should reject appellant's claim here.⁸

2. Assuming *arguendo* that this Court partly rejects the above analysis and concludes that appellant's 5-year special parole term was excessive (even though his total sentence was within the range defined by the district court), we submit that the appropriate remedy here is not to vacate the plea, but to reduce appellant's special parole term from five years to three years, the mandatory minimum of which he was explicitly advised. We fail to see what significant purpose would be advanced by setting aside the plea rather than effecting such a reduction in the special parole term.⁹ And there are particularly good reasons not to allow appellant the benefit of having his plea vacated because of some technical error, especially since the United States Attorney's Office for the Southern District of New York agreed to drop its charges against appellant, following imposition of sentence by the district court, if he pleaded guilty to the instant indictment.¹⁰

⁸ A holding in favor of appellant here would logically mean that a guilty plea must be vacated in the following case (reducing the problem to even simpler terms): a defendant pleads guilty after the district court correctly tells him that the minimum prison term is 5 years, but fails to tell him that the maximum is 10 years; the defendant is then sentenced to a 5-year prison term and moves to set aside the plea on the ground that he was not advised of the possible 10-year statutory maximum. Clearly, *Journet* and related cases do not require *vacatur* of the plea in such circumstances; nor do they require a setting aside of appellant's plea under essentially the same circumstances here.

⁹ Surely, if (notwithstanding our main argument) appellant's special parole term were reduced to three years in accordance with the minimum term that appellant was explicitly advised of with respect to that aspect of his sentence, appellant himself would have no conceivably legitimate basis for complaint. See n. 8, *supra*.

¹⁰ The problem for the government is not only the delay caused by these proceedings, but also the substantial question whether the Southern District would be allowed to prosecute appellant on the charges which it agreed to drop upon sentencing by the district court.

This is not a case such as *Journet*, in which there were a whole series of violations of the requirements of Rule 11 (e.g., failure to advise of right to counsel at trial and right against self-incrimination) which rendered the plea involuntary, thus necessitating that it be vacated. Rather, the single defect in the proceedings here—a failure to advise of the maximum possible duration of special parole—had absolutely no adverse impact on appellant and could be simply cured (if necessary) by reducing appellant's sentence to conform with the 3 year minimum of which he was explicitly advised.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: Brooklyn, New York
November 15, 1977

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

DOLORES M. BYRD

being duly sworn,
deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 18th day of November 1977 he served a copy of the within
BRIEF FOR THE APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:
MARTIN ERDMANN, ESQ., LEGAL AID SOCIETY, 509 U. S. COURTHOUSE,
FOLEY SQUARE, NEW YORK, NEW YORK 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County
of Kings, City of New York.

Dolores M. Byrd

Sworn to before me this
18th day of November 1977

Martha Scharf

MARTHA SCHARF
Notary Public, State of New York
No. 24-3480350
Qualified in Kings County
Commission Expires March 30, 1979

